The Native Commissioner held that appellant abandoned his rights after he received the refund of the £400. There is no evidence to support this finding, on the contrary the evidence indicates that he, at all times persisted in his endeavours to obtain compensation and remained in full possession of the 3 rooms. In Barnard *v.* The Colonial Government (5 S.C. 122), de Villiers, C. J. said: "If the owner who is liable to pay compensation, refuses to pay any, the person in possession, who has effected the improvements, is not bound either to sue the owner, or to retain the land until compensation is paid, but he may elect to remove the materials if he can do so (and this is the important qualification) without altering for the worse the condition of the land, as it was before the improvements were effected".

In De Beers Consolidated Mines *v.* London and South African Exploration Company (10 S.C. 359) it was held that a *bona fide* possessor of land retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has demanded possession such *bona fide* possessor may retain possession until he is compensated for his improvements to the extent of the enhanced value of the land, and failing payment of such compensation, he may remove the materials if he can do so without serious injury to the land, or he may surrender occupation and recover the compensation by action.

There is no evidence that appellant demanded compensation from respondent. It is therefore necessary to consider the question as to whether she was the owner. In Harris *v.* Buissinne's Trustee (2 Men 105) it was held that the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and that an agreement of sale of immovable property, followed by delivery of possession by the vendor to the purchaser, gives the purchaser nothing more than a *jus ad rem,* and a personal claim against the vendor to convey the *jus in re* or *dominium* to him by transfer *coram lege loci.*

Respondent did not receive transfer and was thus not the owner.

It remains to be considered whether respondent was also a *bona fide* possessor of the 3 rooms. The evidence discloses that she was pointed out the property by Mateza, or his agent and that she received rent from the end of June. In view of appellant's definite statement that he received the rent from the 3 rooms up to the time of demolition on the 3rd July, 1950, and that he thereafter provided the three tenants with other accommodation, two of them upon other property of his, it must be inferred that respondent referred to rent from the six rooms only. Applying the test as laid down by *Maasdorp* (*supra*) she could have had only the intention of holding the 3 rooms for herself after the pointing out and did not have physical detention through any one. She thus never acquired legal possession and could not be a possessor of the 3 rooms.

But assuming that when the property was pointed out to her she was placed in possession of all the rooms, and was thus a possessor, her action still must fail because her title, at most, was only equal to, and not stronger than, that of appellant (*Voet* 6.2.6).

The Native Commissioner in his reasons says that, as the improvements were immovable, the decision in Cairncross *v.* Nortje (21 S.C. 127) would seem to support his judgment. I do not agree with the Native Commissioner's view. The decision in that case awarded damages to the purchaser against the vendor in respect of the non-delivery of improvements removed by a lessee, during the currency of his lease, after the contract of sale and before transfer was passed. This case does not support the contention that the purchaser is entitled to these damages from a *bona fide* possessor, but deals only with the purchaser's right *in personam* against the seller for damages.

The appeal is allowed with costs and the judgment of the Court below is altered to one for defendant with costs.

For Appellant: Miss Adv. Egan, Port Elizabeth.

For Respondent: Mr. Thornhill-Cook, Kingwilliamstown.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

MERENSKY-BIBLIOTEEK
UNIVERSITEIT VAN PRETORIA
4 MAY 1953
Klasnommer 54 (68)
Registernommer SDN1/18

(SOUTHERN DIVISION)
1951

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CASE No. 147.

TLOKOTSI SAULI *v.* MOTSOLELE NTLATHI.

KOKSTAD: 27 September, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Kelly and Strydom, members of the Court (Southern Division).

Native Appeal Case—Interpleader—Stock attached in possession of claimant—Presumption of ownership—How rebutted—Onus in interpleader action—If presumption of ownership rebutted onus on claimant to prove why stock not executable.

Appellant obtained judgment against T, the brother of claimant, and attached five cattle which were registered in the name of claimant at the latter's kraal where T also resided. The cattle were claimed by claimant and in an interpleader action the Native Commissioner decleared one of the cattle executable and ordered appellant to pay costs. He made no order in regard to the other four cattle, but it is clear from his reasons that he found that these cattle were not executable.

The appeal is against the Court's finding in regard to the four cattle and against an order as to costs.

Held:

(1) That in interpleader actions the possession of movables raises a presumption of ownership.

Held:

(2) That the onus of proving a fact is, in civil cases, discharged on a preponderance of probability.

Held:

(3) That there is no reason why a higher standard of proof should be required to rebut a rebuttable presumption of law.

Held:

(4) That it is undesirable to lay down a hard and fast rule that the onus in interpleader actions is always on the creditor if the property had been attached in claimant's possession.

Held:

(5) That if property of the debtor sufficient to satisfy the exigency of the warrant is not pointed out the Messenger must attach property which he has reasonable grounds for believing to be the property of the debtor.

Held:

(6) That if it is proved that such property does not belong to the claimant the onus is upon the latter to prove why they are not executable.

Held:

(7) That on a balance of probability the cow and the calf are the property of the debtor and are executable.

Appeal succeeds.

Cases cited:—

Policansky Brothers *v.* Hanau, 25, S.C., 672.

Zandberg *v.* Van Zijl, 1910, A.D., 302.

Ley *v.* Ley's Executors and Others, 1951 (3), S.A. (H), 192.

Martin *v.* Piliso, 1910, E.D.L., 21.

Mhlonthlo *v.* Xakuxaku, 1940, N.A.C. (C. & O.), 52.

Appeal from the judgment of the Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:—

Appellant obtained judgment against Taeli Ntlathi, the brother of respondent who is herein referred to as claimant, and attached five cattle, 27 goats and 19 sheep at the kraal of claimant. In an interpleader action claimant claimed the cattle only. These are described as (1) a red heifer, (2) a red cow, (3) the calf of No. 2, (4) a red ox, and (5) a brown ox. After hearing evidence the Assistant Native Commissioner entered the following judgment: "Heifer declared executable. Respondent (now appellant) to pay costs." He has thus made no order in regard to the other four cattle but it is clear from his reasons that he found that these cattle were not executable.

The appeal is against the whole judgment, but we are assured by counsel that the appeal is against the Court's finding in regard to the four cattle and against the order as to costs.

The statements of claimant both at the time of the attachment and during the course of the trial consist of gross prevarications and numerous falsehoods. The evidence of his only witness, Manapula, the wife of the judgment debtor, is no better. No reliance whatsoever can, therefore, be placed on their testimony. We consequently reject their evidence in regard to the ownership of the cattle.

There is evidence, which we accept, that claimant and the judgment debtor live at the same kraal. Nevertheless, the cattle as well as the small stock were registered in claimant's name and were attached at a kraal of which he is the head. The stock were, therefore, at the time of the attachment, in his possession, and the question for decision is whether the presumption of ownership arising from the possession of movables has been rebutted.

In Policansky Brothers *v.* Hanau (25, S.C., 672), Hopley (J.) said that, "This presumption is one which should be considered in view of the circumstances of each particular case". When, therefore it is established that the claimant and the judgment debtor reside on the same premises and that they both own movable property there, then it seems to me that the presumption loses much of its force.

There is one more matter to which I should refer before considering the evidence. In Zandberg *v.* Van Zijl (1910, A.D., 302). De Villiers, C.J., said that the presumption of ownership arising from prossession of movables in interpleader cases must be rebutted *by clear and satisfactory evidence.* I do not understand from this that the standard of proof required to rebut this presumption is any higher than the proof required to establish a fact in any other civil case. In any event it seems to be settled law now that "no matter how serious an allegation of fact may be, the onus of proving the fact is, in civil cases, discharged on a preponderance of probability" [see Ley *v.* Ley's Executors and Others, 1951 (3), S.A. (H), at p. 192], and there is no reason why a higher standard of proof should be required to rebut a rebuttable presumption of law.

It appears from the evidence that claimant had 12 cattle, 129 sheep and 44 goats registered in his name. He grudgingly admitted that 27 of the goats and 19 of the sheep belonged to the judgment debtor. Altogether about 30 cattle were brought from the mountains. Claimant picked out the 12 registered in his name, and when he was asked to point out the debtor's cattle, he drove aside five cattle including the heifer and the two oxen and then pointed out the heifer as the only beast belonging to the debtor. He never in any other way indicated that the two oxen also belonged to the debtor. There is, however, evidence which we accept, that in 1950 claimant exchanged two big oxen belonging to the debtor for four tollies one of which is beast No. 1 (the red heifer). Appellant's case is that the two oxen attached are two of these tollies, but nowhere in the evidence, nor in the messenger's inventory are these two cattle described as being young. Judging from the cross-examination of claimant these

oxen had been trained to the yoke for some time. The only reference to their age is to be found in the evidence of claimant who stated that they were both about 7 years of age. They could not, therefore, have been tollies in 1950. The presumption of ownership in respect of these two oxen has, therefore, not been rebutted.

The other two cattle attached, namely the cow and the calf, were among the 12 cattle picked out by claimant. In reply to a question as to who the owner of these two cattle was, he stated that they belong to the Headman of the location. The latter, who was present, did not confirm this and has not claimed them since. It is therefore clear that they do not belong to him. Claimant states that he was not present when the cow and calf were attached and, therefore, by implication, denies that he stated that they belong to the Headman. We reject his evidence and once it was proved that claimant had admitted that the cow and the calf did not belong to him the presumptoin of ownership was rebutted. But this does not dispose of the appeal.

It was pointed out in Martin *v.* Piliso (1910, E.D.L., 21) that the enquiry in an interpleader action is of a twofold nature, viz., whether the property claimed by a third party be or be not his property, *and* whether it be or be not liable to execution. In that case the Court held that the burden of proving that it is not liable to execution lies with the claimant (the third party). This Court, however, in Mhlonthlo *v.* Xakuxaku [1940, N.A.C., (C. & O.), 52] dissented from that decision. It held in effect that, except when the property had been attached in the possession of the judgment debtor, the burden of proof always rests with the execution creditor. I am not in entire agreement with this ruling. Rule 2, Order XXV of Proc. No. 145 of 1923 provides that when the attached property is claimed by a third person such claimant shall lodge with the messenger of the Court a statement of the *grounds* upon which it is claimed that such property is not executable. If the property is not then released the claimant shall take out a summons calling upon the creditor to show cause why such property shall not be declared to be unexecutable. As the creditor has *to show cause* it would seem at first sight that the onus is always on the creditor, but this is not so. The Court is entitled in terms of Rule 2 (2) to call upon the claimant to state the nature and particulars of his claim, and where the matters in issue are tried, the provisions of Order XVII shall apply (see Rule 3). It is at this stage of the proceedings that the Court decides where the onus lies [see Rule 5 (1) (a), Order XVII] and the Court must decide this question on the pleadings. Naturally there are no pleadings, as such, in an interpleader action, but there is the document lodged with the messenger containing the *grounds* upon which the property is claimed and if this document is not available then the Court should call upon the claimant to state the nature and particulars of his claim. The particulars of the claim as reflected in the document or in the statement in Court, as the case may be, will then constitute the pleading and the Court will then be able to decide where the onus lies, having regard to the general principles relating to the burden of proof. If the claimant alleges that he had recently purchased the property from the debtor the onus clearly rests with him to prove this transaction, especially when, as in this case, the stock of the claimant and the debtor run together. Further, a person who has a limited interest in the property may interplead (see *Jones & Buckle*, 5th Ed., p. 391), and the circumstances may be such as to throw the onus on the claimant to prove his claim notwithstanding the fact that the property had been attached in his possession. It is therefore undesirable to lay down a hard and fast rule that the onus is always on the creditor if the property had been attached in claimant's possession.

In terms of Rule 5 (1), Order XXIV, the messenger is required to proceed to the house or place of business of the judgment debtor and there demand payment of the debt and costs, or else

require that so much movable property be pointed out as may be sufficient to satisfy the exigency of the warrant, and if no property is pointed out, then the messenger must attach property which he has reasonable grounds for believing to be the property of the debtor. This is what the messenger did in the present case. He went to the kraal of claimant where the debtor also resides and demanded that the debtor's property be pointed out. Goats, sheep and the red heifer, all registered in the name of claimant, where then pointed out by him and where attached. The messenger thereafter attached the cow and calf. Now claimant admitted that these two cattle did not belong to him and they have not been claimed by the Headman. Claimant also admits that the debtor's stock were registered in his name and there is no suggestion that he has registered in his name stock belonging to any other person. There was thus reasonable grounds for believing that these two cattle were the property of the debtor. The onus was therefore on claimant to prove why these two cattle were not executable.

Now he does not claim that he has a limited interest in these animals. He now claims that they belong to him. This is in conflict with his statement at the time of the attachment that they belong to the Headman. Nor has he stated how he acquired them although he described how he acquired the other three cattle. Manapula stated that claimant had bought the cow as a heifer from Matska, but she did not witness the transaction. If he had bought the beast for himself he would not have said that it belonged to the Headman. When the five cattle were being driven away by the messenger claimant tried to rescue the two oxen and requested the messenger to release them. If the cow and the calf were his property he would have claimed them also. We are satisfied that they do not belong to him nor to the Headman. The balance of probability is, therefore that they belong to the debtor, the only other person who owned cattle registered in claimant's name. The two cattle are consequently executable and the appeal succeeds to this extent.

One of the grounds of appeal is that as claimant had obstructed the messenger in the execution of his duty and had given false evidence, the Native Commissioner erred in not ordering claimant to pay all the costs, or at least his own costs, as a mark of the Court's disapproval of and displeasure at claimant's behaviour and malpractices. No doubt this was a case in which the Native Commissioner, in the exercise of his discretion, could have deprived claimant of his costs, or have ordered him to pay all the costs. But it is clear from the record that he was never asked to exercise this discretion, nor, according to his reasons, did he consider, at the time judgment was entered, the question whether claimant should not be deprived of his costs because of his unsatisfactory conduct. He ordered costs against appellant on the general principle that a successful party is entitled to costs.

It is axiomatic that an appellate court will not interfere with the trial court's discretion as to costs unless such court has not exercised its discretion judicially, that is, that it has exercised it capriciously or arbitrarily or upon wrong principles. This presupposes that the judical officer had applied his mind to the question of depriving the successful party of his costs. But when he never applied his mind to this question, how can it be said that his failure to depart from the general principle as to costs was an improper exercise of his discretion? It might have been different if he had refused, without adequate reasons, to depart from the general principle. If this appeal had been against the Native Commissioner's order as to costs only, we are of opinion it would have failed.

We have altered the Native Commissioner's judgment in respect of the claim and we are consequently entitled to alter his judgment in regard to costs also. Claimant has abused the process of the Court by claiming a beast which he had previously pointed out as belonging to the judgment debtor. He has given

false evidence in many respects and to mark our displeasure at his conduct we will deprive him of his costs.

The appeal is allowed with costs and the judgment of the Court below is altered to read as follows: "The red heifer and the cow and its calf are declared executable. The two oxen are declared not executable. There will be no order as to costs."

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Gordon, Mount Fletcher.

CASE No. 148.

FETMAN JOSI *v.* **MZEKANISI MAKAMBA.**

KOKSTAD: 27th September, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Kelly and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—Desertion of wife—Judgment ordering restoration—What is genuine return —where return of wife is admitted onus of proving return not genuine on plaintiff.

Appellant's wife deserted him. He sued the dowry holder for her return alternatively for restoration of dowry. After judgment the woman returned but later left again and she has not been seen since. Appellant then issued a writ and attached twelve head of cattle. In an appeal against a judgment setting aside the writ and the attachment

Held:

(1) That the return of the wife without a genuine intention of restoring conjugal rights is not a sufficient compliance with a judgment ordering restoration.

Held:

(2) That the Court must look to the intention of the wife rather than to that of her father to determine whether there has been a genuine compliance with the judgment.

Held:

(3) That where the wife had returned but deserted again the onus is on the plaintiff to prove that the *animus revertendi* was absent.

Held:

(4) That there is no evidence from which it can be inferred that the wife's return was not genuine.

Held:

(5) That the trial Court was therefore correct in setting aside the warrant of execution and the attachment thereunder.

Appeal dismissed.

Cases cited:—

Zabulana *v.* Mpandla, 4, N.A.C., 103.

Wessels *v.* Wessels, 1950 (3), S.A. (O.), 852.

Appeal from the judgment of the Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment setting aside a warrant of execution and the attachment thereunder.

The undisputed facts are that appellant's wife deserted him. He sued to dowry holder, the late Mqobosho, son of respondent,

for her return, or alternatively, restoration of the dowry paid for her. On 7th June, 1950, judgment was entered by consent in favour of appellant for the return of his wife on or before the 16th June, failing which the return of twelve cattle and one horse. She returned to him on the 14th June, 1950. On the 5th August, 1950, appellant left his kraal to cut grass and instructed his wife to bring his food at midday. She did so, but when he returned home that evening she was not at his kraal and she has not been seen since either by appellant or by respondent to whom her disappearance was reported, Mqobosho having died. Appellant then consulted his attorney and after respondent, the heir of Mqobosho, had been substituted as defendant, a writ was issued and twelve cattle were attached.

The Assistant Native Commissioner's reason for setting aside the attachment is that there was a genuine compliance with the judgment of the 7th June, 1950. He relies on the case of Zabulana *v.* Mpandla (4, N.A.C., 103) in which the facts were almost on all fours with the facts in the present case. In Zabulana's case the learned President said "whatever the woman's intention may have been, it is clear from the proceedings that the defendant carried out the judgment, and it cannot be implied from the subsequent action of the woman that he did not intend her to remain with her husband." In my opinion this statement is too wide. The mere return of the wife to the husband is not a sufficient compliance with a judgment ordering restoration of conjugal rights. There must be an intention to restore such rights and since a father cannot legally compel his daughter to return to her husband against her wish, the father's intention, however genuine and sincere it might be, is of little consequence in cases of this nature. The Court must look to the woman's intention to determine whether there has been a genuine compliance with the judgment. For instance, if the father persuades his daughter to return and she deserts again almost immediately or refuses to cohabit with her husband her return is not genuine and not a compliance with the Court's order. Where, however, it is admitted that the woman did return the onus is on the plaintiff to prove that in spite of such return the *animus revertendi* was absent [Wessels *v.* Wessels, 1950 (3), S.A. (O.), 852]. Such intention may be inferred from the conduct of the woman.

Now in the present case the woman lived with the appellant for seven weeks after her return. There is no evidence that she was induced to return to appellant against her wish, or that she was unhappy, or that she threatened to abscond again, or that she left again at the instigation of respondent or with his knowledge or consent. Nor is there any evidence that respondent wrongfully refused to disclose where she is. If she had been illtreated by appellant she would normally have returned to respondent's kraal to complain. The fact that she did not do so is an indication that she had no good cause for leaving appellant again, but that does not necessarily mean that her return was not genuine. Moreover, there is no evidence as to what happened to her. For all we know she might have met with some catastrophe as there is no evidence that she had taken her personal belongings with her. There is thus no evidence from which the Court could infer that she never intended to remain with appellant and that her return was not genuine.

The Native commissioner was therefore correct in setting aside the warrant and the attachment. The appeal is dismissed with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Gordon, Mount Fletcher.

CASE No. 149.

HENRY MLANDU *v.* TITUS MATEE.

KOKSTAD: 27th September, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Kelly and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Fine for seduction and pregnancy—Widows—General rule no fine payable for intercourse with widow though it results in pregnancy—Exceptions are: (1) ukungena *husband of the widow can maintain an action for adultery,* (2) *among Pondos an action lies for the pregnancy of a* dikazi.

W married B the daughter of appellant according to Christian rites and paid a full hlubi dowry. W dies and B returned to appellant's kraal where respondent had intercourse with her and caused her pregnancy. An action for the payment of six head of cattle or their value £30 as fine was dismissed.

Held:

(1) That as B was married to her husband by christian rites her status must be determined according to common law.

Held:

(2) That since her marriage was dissolved by death of her husband she, being a major, did not legally fall under the guardianship of appellant.

Held:

(3) That in any event no action lies for intercourse with a widow, or with a *ngenaed* wife who has deserted her husband's kraal, unless the parties are Pondos.

Appeal fails.

Cased cited:—

Jama *v.* Veldtman, 1, N.A.C., 107.

Mdoda *v.* Skeyi, 3, N.A.C., 287.

Dleleni *v.* Mkwayi, 1, N.A.C., 240.

Raqa *v.* Qawe, 1, N.A.C., 14.

Cases overruled:—

Mazolo *v.* Nyangiwe, 1, N.A.C., 21.

Appeal from the judgment of the Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:—

Wilmot married Beauty, the daughter of appellant, on the Rand according to Christian rites and paid a full Hlubi dowry for her. Wilmot died on the Rand and Beauty then returned to appellant's kraal where respondent had carnal intercourse with her and caused her pregnancy. The Assistant Native Commissioner dismissed an action by appellant for payment of six head of cattle or their value £30 as fine for the pregnancy. From this judgment appellant appeals.

The general rule is that no fine is payable for intercourse with a widow even though it results in pregnancy (Jama *v.* Veldtman,

1, N.A.C., 107). To this rule there are two exceptions. The first is that among the tribes which practice *ukungena* the duly appointed *ukungena* husband of the widow can maintain an action for adultery (Mdoda *v.* Skeyi, 3, N.A.C., 287). If no husband has been appointed no action lies (*Whitfield's S.A. Native Law,* 2nd Ed., p. 447) and Thakudi and Ano *v.* Jacob reported in *Seymour's Native Law and Custom,* at p. 173. The other exception is that among the Pondo tribe an action lies for the pregnancy of a widow who has become a *dikazi,* that is, a widow who has deserted her late husband's kraal and has returned to her own father's kraal where she has reverted to the status of a girl at that kraal. In such a case an action lies at the instance of her father or his heir (Dleleni *v.* Mkwayi, 1, N.A.C., 240).

In Mazolo *v.* Nyangiwe (1, N.A.C., 21), which came from Umzimkulu district, it was decided that the plaintiff was entitled to recover the usual fine for the pregnancy of the widow of his deceased son. The widow had been living at his kraal where his son also lived during his lifetime. In that case the learned President said: "According to Native Law a woman living with the friends of the deceased husband holds a responsible position and any man putting her in the family way is liable to pay substantial damages. The person to sue in such a case would be the head of the kraal under whose protection the woman is living." No authority was cited in support of this statement of the law. It is obvious that the widow had not been *ngenaed,* consequently the decision is inconsistent with what Whitfield says (*supra*), and is in conflict with the decision in *Dleleni's* case, since the action was instituted by the father of the deceased husband and not by the woman's father. Mazolo's case was decided in September, 1897, and, as far as we have been able to ascertain, it has not been followed since, although there must have been many instances where a widow living at the kraal of her deceased husband has been rendered pregnant. In our opinion, therefore, Mazolo's case was incorrectly decided.

In the present case it is contended that as Beauty never lived at the kraal of her husband's people and was never putumaed by them, she fell under the guardianship of appellant on her return from the Rand and consequently appellant is entitled to maintain an action for damages for her seduction (*sic*) and pregnancy. This contention is untenable. In the first place Beauty was married to her husband according to Christian rites. Her status must, therefore, be determined according to Common Law. Since her marriage was absolutely dissolved by the death of her husband she, being a major did not legally fall under the guardianship of appellant.

Secondly, appellant is virtually asking the Court to apply Pondo law to his case, but he is a Hlubi and respondent is presumably a Basuto and no authority has been cited that these tribes follow the Pondo Custom as enunciated in Dleleni's case (*supra*). On the contrary, it was held in Nkwane *v.* Nqakamatye (heard at Kokstad and reported in *Seymour's Native Law and Custom,* at p. 160) that no action lies for intercourse with a widow who has left her deceased husband's kraal and this is so even if the widow had been *ngenaed* but has deserted the kraal of her husband (Raqa *v.* Qawe, 1, N.A.C., 14). It is thus clear that, unless the parties are Pondos, no action lies at the instance of the widow's father for damages for illicit intercourse with her.

The appeal is consequently dismissed with costs.

For Appellant: Mr. Gordon, Mount Fletcher.

For Respondent: In default.

CASE No. 150.

MRWAYI MHLANTI *v.* MEYIWA NONONO.

KOKSTAD: 28th September, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Kelly and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Marriage by Native Custom —Return of customary wife failing which restoration of dowry —Husband has legal right for her return even if he has no intention of receiving her.

Plaintiff obtained judgment for the return of his customary wife, M, within one month or, failing return, restoration of dowry paid less the customary deductions. Defendant, the father of M, appeals.

Held:

(1) That where the wife has been *putunaed* and refused to return, husband has a legal right for her return even if he has no intention of receiving her.

Held:

(2) If the father returns his daughter to plaintiff and the latter refuses to receive her, he will be barred from suing again.

Appeal fails.

Cases cited:—

Park *v.* Park, 1917, E.D.L., 401.

Appeal from the judgment of the Native Commissioner, Mount Frere.

Sleigh (President), delivering the judgment of the Court:—

Plaintiff obtained a judgment in the Native Commissioner's Court for the return of his customary wife, Mamashiya, within one month or, failing return, restoration of the dowry paid for her less the customary deductions. From this judgment defendant, the father of Mamashiya, appeals.

The evidence shows that Mamashiya deserted plaintiff without lawful cause and that he found her and took her to defendant who undertook to return her to plaintiff. The first question for decision is whether she was returned.

It is common cause that the trouble between plaintiff and his wife was that he objected to her attending beer-drinks and taking snuff and her refusal to desist. It is also common cause that plaintiff took her to defendant's kraal on a Friday and that she has now disappeared. Plaintiff states that the woman never returned to his kraal, but defendant states that Mamashiya left his kraal on the Saturday accompanied by his own wife; and the latter states that she went with the woman some distance but is not able to say whether she actually reached plaintiff's kraal. Defendant goes on to say that the woman must have returned to plaintiff because the latter reported on the following Monday that she had again deserted. In our opinion the Assistant Native Commissioner rightly rejected this evidence. If she had returned on the instructions of defendant and plaintiff had driven her away she would have complained to her father. She did not do so. Moreover, according to the evidence for plaintiff, Mamashiya had stated in reply to a question by defendant that she preferred beer to her husband. This evidence is consistent with plaintiff's testimony that she never returned to his kraal. Plaintiff has complied with custom and on the evidence he is clearly entitled to the judgment granted in his favour.

Under cross-examination plaintiff stated: "I wanted my wife back but she rejected me. I am now claiming the return of my dowry. I am not asking for the return of my wife because I do not want her—because she drinks too much beer and takes snuff . . . If she came to my kraal with a genuine intention of returning to me I would not have her back . . . It would be useless for defendant to bring my wife back to me." It is contended that this was a public and an unjustifiable repudiation by plaintiff of his wife and consequently he was not, according to Native Law, entitled to either the return of his wife or restoration of the dowry. This is a question of law, and Rule 10 (*b*) of the Native Appeal Court rules provides that the grounds of appeal shall be stated clearly and specifically. Nowhere in the notice of appeal is the judgment attacked on the ground that plaintiff had forfeited his right to the return of his wife or her dowry by the unlawful repudiation of his wife; and in view of the provisions of Rule 22 defendant (appellant) cannot now take this point without leave of the Court. No such leave has been obtained. For the same reason defendant cannot now contend that the Assistant Native Commissioner erred in granting an order for the return of plaintiff's wife after plaintiff had abandoned this portion of his claim.

One of the grounds of appeal is that plaintiff's evidence and admissions as stated above clearly establish the fact that he has rejected and discarded his wife and that he had made it impossible for defendant to comply with the judgment of the Court. Now it is true the plaintiff appears to have decided that he will not receive his wife if she does return. But does this disentitle him to the judgment claimed in his summons? In Park *v.* Park (1917, E.D.L., 401) the plaintiff (the wife) stated that she would under no circumstances live with her husband again. Nevertheless, it was held that she was legally entitled to an order for restitution of conjugal rights. This is the practice today in ordinary divorce cases. In my opinion the same principle applies to restitution cases under Native Custom. Unless there is clear proof that the wife had repudiated her husband, for instance, by contracting a civil marriage with another man, the husband is not permitted to sue for the return of the dowry only. Such a claim must be coupled with and be alternative to a claim for the return of the wife. If he can show that his wife had deserted him and failed to return on being *putumaed*, he has a legal right to a judgment for her return, and this even if he has no intention of receiving her. Evidence of his intention may be relevant if it is a question of whether or not he had driven his wife away, but when it is admitted that she had deserted without lawful cause, such evidence is irrelevant at that stage of the proceedings, because he is entitled to change his mind when she is erturned to him. In any event his expressed intention of refusing to receive her if she does return in no way renders it impossible for the defendant to comply with the Court's judgment. If he returns his daughter to plaintiff and the latter refuses to receive her, he will be barred from suing again.

The appeal consequently fails and is dismissed with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 151.

RWANQA NKONZO *v.* TEKWANE JIM.

KOKSTAD: 28th September, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Kelly and Strydom, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—Return of wife—Obligation for securing return primarily on husband—Husband must putuma *wife—Obligation on father of wife to afford every assistance in search—No obligation on father to search for her in distant country—Father of wife not obliged to pay husband's expenses in search.*

Plaintiff sued defendant for the return of his customary wife failing which restoration of the dowry paid less deductions.

Held:

(1) That the obligation of securing the return of the wife primarily rests on the husband.

Held:

(2) That in order to succeed appellant must show that he has *putumaed* her and that she refused to return to him, or to respondent.

Held:

(3) That there is an obligation upon the father of the woman to afford her husband every assistance in his search for his wife, but there is no obligation on him to search for her in a distant country, much less to pay the husband's expenses in the search.

Appeal dismissed.

Cases cited:—

Willie *v.* Skyman, 1943, N.A.C. (C. & O.), 61.

Mampeyi *v.* Rarai, 1937, N.A.C. (C. & O.), 148.

Sibonana *v.* Dlokova, 1, N.A.C. (S), 281.

Appeal from the judgment of the Native Commissioner, Umzimkulu.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for defendant in an action in which plaintiff (now appellant) claimed the return of his customary wife, Gcokwe, or restoration of the dowry paid for her less the customary deductions.

The facts are not in dispute. Gcokwe deserted appellant in 1949. He notified respondent, her father, and searched for her without success. In 1951 it was ascertained through a firm of attorneys in Pretoria that she owns a house at 1067 Fortune Street, Lady Selbourne Location, Pretoria, that she actually lived in Mooiplaas Location, but her residential address could not be ascertained. Appellant then, through his attorney, sent a letter to Gcokwe calling upon her to return to appellant within one month. The letter was sent to Nivat Dlamini with the request to hand it to the woman. Nivat was, however, unable to find her. Appellant is prepared to accompany respondent to Pretoria at the latter's expense to search for the woman.

The Assistant Native Commissioner says in his reasons that in the absence of evidence that respondent is acting in collusion with his daughter, there is no obligation upon him to restore the dowry paid for her unless appellant first takes her to respondent's kraal and she there states that she will not return to appellant. For this statement of the law the Native Commissioner relies on the case Willie *v.* Skyman [1943, N.A.C. (C. & O.), 61].

In Mampeyi *v.* Rarai [1937, N.A.C. (C. & O.), 148], the Native Assessors stated:—

> "When a woman leaves her husband's kraal it is his duty to look for her first and when he finds her to take her to her people and she will then say whether or not she wishes to go back to her husband. It is essential for the woman to be produced to her people before the husband can claim the return of his dowry."

This statement of the law presents a difficulty. What should the husband do if he finds his wife and she refuses to accompany him to her father's kraal? Whatever the original custom might have been, it is obvious that under present conditions he cannot force her to accompany him. As was pointed out in Sibovana *v.* Dlokova [1, N.A.C. (S), 281], the obligation of securing the return of the wife primarily rests on the husband. It is his duty in the first place to *putuma* her. If she refuses to return to him and also refuses to accompany him to her father's kraal, he should report these facts to her father who will then be under an obligation either to restore the wife or refund the dowry.

In order to succeed appellant must show that he has *putumaed* fact there is no admissible evidence that she lives in Mooiplaas Location. Even if she does, there is no indication where she is to be found in that location. Appellant takes up the attitude that it is respondent's duty to search for her in Mooiplaas Location. He offers to help provided respondent pays his expenses. There is an obligation upon the father of a woman to afford her husband every assistance in his search for his wife, but there is no obligation on him to search for her in a distant country, much less to pay the husband's expenses in connection with the search.

In order to succeed appellant must show that he has *putumaed* his wife and that she refuses to return to him or to respondent. He has not *putumaed* her and, as he has not been in touch with her since she left in 1949, he is not in position to say that she refuses to return. The appeal consequently fails.

The Assistant Native Commissioner has given a final judgment for defendant (respondent). The question is whether this judgment will be a bar to a future action after appellant had complied with the requirements stated above. We do not think so, but to dispel any doubt on the question the judgment of the Court below will be altered to one of absolution.

The appeal is dismissed with costs but the judgment of the Court below is altered to one of absolution from the instance with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 152.

MPALAMPELA NOMANTUNGA *v.* **LOXA NGANGANA.**

Port St. Johns: 9th October, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Midgley and Visser, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Child—Allotment of only daughter to a younger son contrary to custom—Practice and Procedure—Civil issue can be decided on preponderance of probability—Acts contrary to custom improbable.

Plaintiff sued defendant for the return of his customary wife, failing which restoration of the dowry paid less the usual deductions.

Apart from disputting the number of stock paid as dowry defendant pleaded that M, plaintiff's customary wife, had been allotted to his younger brother by his late father. The Native Commissioner found this proved and dismissed plaintiff's claim.

Held:

(1) That it is contrary to native custom for a father to allot an only daughter to a younger son.

Held:

(2) That any issue in a civil case can be decided on the preponderance of probability. When, however, an alleged fact is contrary to established custom it is improbable that the act was performed. The Court will then have to be satisfied by conclusive evidence that custom had been departed from for good and sufficient reasons.

Held:

(3) That defendant has failed to prove the allotment.

Appeal succeeds.

Cases cited:—

Sigwaca *v.* Sigwaca, 1939, N.A.C. (C. & O.), 157.

Tsibiyana *v.* Nyongeni, 3, N.A.C., 26.

Mayekiso *v.* Quwe, 1942, N.A.C. (C. & O.), 38.

Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47.

Appeal from the judgment of the Native Commissioner, Port St. Johns.

Sleigh (President), delivering the judgment of the Court:—

Plaintiff (now appellant) sued defendant (now respondent) for the return of his customary wife, Maloxa, failing which, restoration of the dowry paid for her less the usual deductoins or payment of their value.

Apart from disputing the number of stock paid as dowry respondent pleaded that Maloxa had been allotted to his younger brother, Mancoko, by their late father, Ngangana. The Native Commissioner found this proved and dismissed appellant's claim. From this judgment appellant appeals.

It is common cause that Maloxa was the only child in the right-hand house of Ngangana. Respondent, the eldest son in the great house, would therefore also be the heir in the right-hand house and be entitled to the dowry paid for Maloxa.

The questions for decision are therefore whether Maloxa had been allotted to Mancoko and, if so, whether respondent had accounted for the dowry of the girl to Mancoko. The onus of proving these allegations rests on respondent.

Respondent states that there had been such an allotment by his father at a meeting called for the purpose and that Mancoko was also allotted at the same time certain seven cattle. He states that of the relatives present, Mzingeli, Duna and Valipatwa are still alive. Valipatwa supports respondent's evidence and Mcayi states that he was present at a meeting called by Mancoko at which the question of returning Maloxa to her husband was discussed.

Mancoko admits that he was allotted seven cattle by his father, but he and Maloxa deny the allotment of the girl. Mancoko further denies that appellant demanded the return of his wife from him. Maloxa says that she was present at a meeting called by respondent when the latter stated that he would *keta* the dowry in cash. Appellant states that he demanded the return of his wife from respondent and not from Mancoko. The evidence of the allotment of Maloxa is thus inconclusive.

Now one of the objects of allotting a daugther to a younger son is to give such son a right to the dowry of the daughter with which he will be able to pay lobola for his own wife. But native assessors have repeatedly stated that it is contrary to custom to allot the eldest or only daughter to a younger son.

[See Sigwaca *v.* Sigwaca, 1939, N.A.C. (C. & O.), 157 and Tsibiyana *v.* Nyangeni, 3, N.A.C., 26.] In the present case the native assessors were again consulted. It will be seen from their replies —a record of which is annexed—that they are of opinion that it was not competent for Ngangana to allot Maloxa to Mancoko. Native assessors frequently state that it is not competent to do this or that when all they mean to convey is that it is contrary to custom to do so. We shall assume for the purpose of this case that it was competent for Ngangana to allot the girl to this younger son. But was such an allotment made? Any issue in a civil case can be decided on a preponderance of probability. When, however, an alleged act is contrary to established custom it is improbable that the act was performed. The Court will then have to be satisfied by conclusive evidence that custom had been departed from for good and sufficient reasons. The probability in this case is therefore against respondent's allegation of allotment, and, as I have already stated, the evidence of the allotment is inconclusive. Further there was no good reason for the allotment. Ngangana was a rich man and if he desired to make adequate provisions for Mancoko he could have allotted him more cattle. We therefore disagree with the Native Commissioner's finding that the allotment had been made. This virtually disposes of the case, but the appeal must also succeed on another ground.

It is a well established custom that dowry is paid at the kraal where the girl lives, and should the dowry become refundable at a subsequent date, restoration must be made by the head of that kraal. Such head can escape liability only if he can show that the dowry had been accounted for to the person who was entitled thereto. [See Mayekiso *v.* Quwe, 1942, N.A.C. (C. & O.), 38 and Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47.] Now respondent says that Mancoko used the girl's dowry to pay lobola for his own wife. This Mancoko denies and his denial is supported by the fact that he paid only six cattle for his wife and now has no more cattle. Respondent has, in our opinion, failed to discharge the onus which was on him and the appeal consequently succeeds.

At the hearing of the appeal counsel for appellant agreed to the deduction of two catlle for the use of the woman and the marriage outfit, and did not challenge the Native Commissioner's finding that 7 cattle, 2 horses and 10 sheep had been paid as dowry.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for the return of his wife on or before the 9th November, 1951, failing which for delivery of five head of cattle or their value £40, two horses or their value £30 and ten sheep or their value £15. Defendant to pay costs.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Harvey, Lusikisiki.

Questions put to and replies given by Native Assessors.

Tolikana Mangala, Nobulongwe Masipula, Mdabuka Mqikela, Nombekile Libod and Makosonke Mtshubandaba.

Question.—A rich man had two wives. In the first house he had two sons and a daughter. The sons were Blayi and Xego. The daughter got married and her father took her dowry. In the second house there was only one daughter—no sons. When the father was old and sickly his daughter in the right-hand house was unmarried. It is alleged that he allotted this daughter to Xego (the second son in the great house). Blayi the heir in the great house was also the heir in the right-hand house. Is it in accordance with custom for the father to allot this daughter to Xego?

Reply.—Tolikana: Even if there were two or three daughters in the right-hand house Xego could not be allotted any of them. What could be done is that the father could say "I will give you

cattle from the dowry of one of these daughters ". As there was no son in the right-hand house the stock belonging to that house was Blayi's inheritance ".

Question.—Would it make any difference if this was a deathbed allotment?

Reply.—No. A father could not do that.

Nobulongwe.—" We agree with Tolikana ".

Mdabuka.—Especially as there was only one daughter in the right-hand house. She cannot be allotted to anybody because that girl belongs to that house and her dowry must go to the heir of that house.

Nombekile.—We observe the custom that the first and last daughters cannot be allotted.

Question.—If it is clear that a man gave his daughter in the right-hand house to his second son in the great house would you recognise it?

Nobulangwe.—No we would not recognise it as it is contrary to custom.

Question.—Does any significance attach to the fact that the girl was given the married name of Maxego?

Nobulongwe.—The girl should not be given the name of Maxego She should be called Mablayi after the eldest son.

Tolikana.—I do not quite agree. The fact that the woman was named Maxego does not mean anything. The people who have married her can select the name for her that they like.

Question.—Will the fact that the eldest son in the great house inherited the dowries of seven women and that he agreed to the allotment of the girl to Xego make any difference?

Tolikana.—It is not in order for the father to allot a girl to Xego. He should have been given cattle from the dowry of the girl. The other assessors agree.

CASE No. 153.

MAKOLOTI STELEKI *v.* **JEJE STELEKI.**

KINGWILLIAMSTOWN: 19th November, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Title Deed issued under Glen Grey Act (No. 24 of 1894)—Cancellation for non-beneficial occupation—Meaning of beneficial occupation—Obligation of person left in charge of land—Fraud.

Nkowane Steleki who was the registered holder of Garden Lot No. 33, Zwartwater location, Glen Grey district, left the district in 1934 with his family and settled in Rustenburg district, Transvaal. He left the Lot in charge of respondent but did not obtain the necessary permission as is required by section 100 of G.N. No. 936 of 1919. In March, 1936, the title was cancelled for non-beneficial occupation. In August, 1936, respondent applied for the allotment and it was granted in December, 1937. Nkowane died after cancellation.

In the particulars of claim it is alleged that plaintiff (now appellant) is the guardian of a minor B who is the grandson and heir of the late Nkowane. That the said allotment was wrongfully and unlawfully cancelled as the result of fraudulent acts of respondent and was allotted to him. In his plea respondent denies that the cancellation of the title deed was the result of any fraudulent act on his part.

Held:

(1) That the cancellation of the title deed was an official act for which respondent was in no way responsible.

Held:

(2) That as respondent undertook to take care of the land he was under an obligation to take all necessary steps to preserve Nkowane's interest in the land, and if he wilfully neglected to do so with the object of acquiring the land for himself, his conduct would be fraudulent.

Held:

(3) That the cancellation of the land was due to the default of Nkowane who failed to obtain the necessary permission to leave the land in charge of respondent and who failed to take effective steps to prevent cancellation when he heard that it was to be cancelled.

Held:

(4) That once the land was forfeited respondent had the right to apply for it.

Appeal fails.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President), delivering the judgment of the Court:—

Appellant, who was plaintiff in the Court below, is the guardian of a minor, Bencani Steleki, who is the grandson and heir of the late Nkowane Steleki. The latter was the registered holder of Garden Lot No. 33, situate in Zwartwater location, Glen Grey district. In 1934 Nkowane left Glen Grey district with his family and settled in Rustenburg district, Transvaal. He left the land in charge of defendant (now respondent), but did not obtain the necessary permission to do so from the Magistrate or from the Superintendent of Natives as is required by section 100 of Government Notice No. 936 of 1919 which was in force at the time. On 23rd March, 1936 the title to the land was cancelled for non-beneficial occupation with effect from 31st December, 1935. On 27th August, 1936, respondent applied for the allotment and it was granted to him on 21st December, 1937. Nkowane died after cancellation.

In this action appellant attempts to obtain transfer of the title deed to his ward. The material allegations in the summons are that at about March, 1936, the said allotment was wrongfully and unlawfully cancelled as the result of the fraudulent acts of respondent and was allotted to him. Appellant prays:—

(*a*) That the cancellation of the quitrent allotment, Lot No. 33, granted to Nkowane Steleki and situate in the Zwartwater location in the district of Glen Grey be declared null and void and that the order for such cancellation and re-allotment be rescinded.

(*b*) That the Registrar of Deeds in the Native Deeds Office in Kingwilliamstown be directed to transfer the said Lot No. 33 in terms of section *twenty* of Act No. 47 of 1937, as amended by section *twenty-one* of Act No. 56 of 1949, to and in favour of Bencani Steleki and to make the necessary entry and/or alteration in the said Deeds Registry.

(*c*) That the defendant be directed to do all things necessary to effect the said transfer.

(*d*) Alternative relief.

(*e*) Cost of suit.

In his plea respondent denies that the cancellation of the title deed was the result of any fraudulent act on his part. After hearing evidence the Assistant Native Commissioner dismissed the summons with costs and appellant now appeals on the sole ground that "the judgment is against the weight of evidence and is not supported thereby".

The cancellation of the title deed to the land was an official act for which, on the evidence before us, respondent was in no way responsible; and since the Government is not a party to this action Counsel for appellant has rightly conceded that it would not be competent for this Court to declare the cancellation unlawful.

Respondent undertook to take care of the land. He was, therefore, under an obligation to take all necessary steps to preserve Nkowane's interest in the land. If he wilfully neglected to do so with the object of acquiring the land for himself, his conduct would be fraudulent. As he is now the registered owner, the question we have to decide is whether the trial Court should have granted restitution *in integrum* on the ground of fraud, leaving aside the question of prescription which was not pleaded.

In terms of the conditions of title deeds issued under the Glen Grey Act (No. 24 of 1894) the right to land is liable to forfeiture if it is not benefically occupied. Section 99 of Government Notice No. 936 of 1919 defines *beneficial occupation* as including the cultivation of an allotment by the approved representative of the registered holder. Where, therefore, the registered holder leaves the district temporarily he is required in terms of section 100, to obtain the written permission of the Magistrate of the district or the Superintendent of Natives to leave the land in charge of a representative. If he fails to do so the land is deemed to be not beneficially occupied.

When Nkowane left Glen Grey district in 1934 he tried to sell the land, in fact the evidence goes to show that he was told in the Land Office to dispose of it. It is clear that he did not do so, nor did he obtain the necessary permission to leave the land in the care of respondent. Ex-constable Jeremiah Ngcozana, who gave evidence for the defence and who was employed in the Land Office in 1934, states that after Nkowane had left the district Headman Mboko reported that Lot No. 33 was vacant. By this I understand him to mean that the land was not cultivated by Nkowane, because it is common cause that the land was regularly cultivated by respondent. This view is supported by the fact that there is an endorsement in the quitrent register at folio 33 and dated 19th October, 1934 that a permit must be applied for. It is not clear whether this requirement was brought specially to the notice of respondent but he states that when notice of cancellation was attached to the beacon of the land he notified Nkowane. The latter's widow denies this but it is clear that Nkowane became aware that his right to the land was in jeopardy, because his daughter, Ntindiwe, states that in the ploughing season of 1935 she heard from constable Ngcozana that respondent wanted to transfer this land to himself and that she then notified her father of this and suggested that he send a telegram to the Magistrate and come home. He sent a telegram to the Magistrate dated 9th October, 1935 and a reply was sent to him that nothing would be done until January, 1936. Notwithstanding this the land was submitted for forfeiture on 20th December, 1935, and the forfeiture was approved by Ex. Co. Minute No. 603 of 23/3/1936 with effect from 31st December, 1935.

The evidence is conflicting as to whether Nkowane came home to attend to the matter. Respondent and Ngcozana say he did whereas Ntindiwe says that he did not on account of the illness of his son. Whichever story is true the fact remains that Nkowane's right to the land was cancelled through his own default. In the first place he failed to obtain the necessary permission to leave the land in charge of respondent and secondly when he heard it was to be forfeited he took no effective steps to prevent it. If respondent had written to him that a forfeiture notice had been served it is difficult to see what more he could have done. It must not be overlooked that Nkowane left the district permanently. He had been struck off the tax registers in the Glen Grey district and presumably re-registered in the Rustenburg district. Under these circumstances

respondent could not legally insist that he be given permission to cultivate the land on behalf of Nkowane, nor could he prevent the cancellation. Once the land was forfeited respondent had the right to apply for it. He could not apply for it on behalf of Nkowane who was then not a resident of Glen Grey district.

The appeal is dismissed with costs.

For Appellant: Miss Adv. Egan, Port Elizabeth.

For Respondent: Mr. Kelly, Lady Frere.

CASE No. 154.

NQOKOLOZANA GWATYU *v.* LURWETSHU GWATYU.

KINGWILLIAMSTOWN: 19th November, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Estate—Enquiry in terms of G.N. No. 1664 *of* 1929*—Onus—on Native Commissioner to call such witnesses as he may consider necessary—In estate enquiries the Native Commissioner has an absolute discretion to allow parties to be legally represented.*

In an enquiry held in terms of section 3 (3) of Government Notice No. 1664 of 1929 the Native Commissioner held that respondent is the heir to the late Jan Gwatyu, registered holder of Lot No. 469, Buffelsdoorns, Glen Grey district, and is entitled to succeed to and take transfer of the said lot. From this ruling appellant has appealed.

Held:

(1) That regulation No. 3 (3) throws the onus upon the Native Commissioner to call such witnesses as he may consider necessary. He thus has a discretion as to what witnesses to call, but he must exercise this discretion judicially bearing in mind that he cannot administer justice unless he hears both sides.

Held:

(2) That as appellant had no opportunity to challenge the evidence for respondent that the latter administered Jan's estate, the Native Commissioner should have called the witnesses of appellant when the latter intimated that it was his father who administered the estate.

Held:

(3) That in estate matters the Native Commissioner has an absolute discretion to allow parties to be represented.

Appeal succeeds.

Cases cited:—

Lequoa *v.* Sipamla, 1944, N.A.C. (C. & O.), 85.

Zulu *v.* Tyobeka, 1943, N.A.C. (C. & O.), 41.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President), delivering the judgment of the Court:—

In an enquiry held in terms of section 3 (3) of Government Notice No. 1664 of 1929 the Acting Assistant Native Commissioner held that respondent is the heir of the late Jan Gwatyu, registered holder of Lot No. 469, Buffeldoorns, Glen Grey district and is entitled to succeed to and take transfer of the said lot. From this ruling appellant has appealed.

It is common cause that Jan had four wives. His great wife was Nolentyi the grandmother of appellant, and the first *qadi*

in his great house was Notawuli the mother of respondent. On the face of it, therefore, appellant is the heir of Jan, his father Mangaliso being dead, but respondent alleges that Mangaliso was the son of Xalanto and was already born when Jan married his mother, Nolentyi. who had no other male issue. The onus was therefore on respondent to prove his allegation.

Jan died during the 1914-18 war. As may be expected the evidence now available is largely of repute, but Ralisa Ntshikwana, who is described as a very old man, states that when Jan married Nolentyi, Mangaliso was about 6 to 8 years of age and that he was the son of Xalanto. He states further that when Jan died respondent took charge of his estate, that respondent is the heir and that this has never been disputed. Nomfazwe, Jan's daughter by his right-hand wife, Nokewuli his daughter-in-law and his nephews Dumba and Patosi all say that respondent was always regarded as the heir and took charge of Jan's estate when the latter died, and that Mangaliso, who grew up at Jan's kraal, received no benefit out of the estate. Respondent and Dumba say further that Mangaliso never claimed Jan's estate.

The only witness of appellant who can give admissible evidence is Stephen Plaati, a cousin of Jan. He says that he was told by his father and by Jan that Mangaliso was the eldest son of Jan. All his other witnesses testify to the fact, which is common cause, that Nolentyi was the great wife of Jan.

The weight of evidence thus clearly supports the Native Commissioner's finding, but it appears from the record that appellant and his witnesses gave evidence first and apparently respondent was not invited to cross-examine them, nor indeed was appellant invited to cross-examine respondent and his witnesses. Appellant, who stated after the close of the case, that Mangaliso administered Jan's estate had thus no opportunity of testing the evidence of respondent and his witnesses in regard to the administration of the estate.

We are now asked to set aside the finding and remit the case for further evidence. Now if there had been no evidence as to who administered the estate the Native Commissioner's finding would be correct, but it is clear from the Native Commissioner's reasons that he was influenced by the evidence that the respondent administered the estate and rightly so, because if there had been any dispute as to the heir this matter would have been raised and settled at the time of Jan's death and if either of the parties had allowed the other to assume ownership of the assets in the estate and had taken no steps to recover the property his conduct would have gone a long way to establish that he was not the heir [see Lequoa *v.* Sipamla, 1944, N.A.C., (C. & O.), 85]; but as I have stated appellant was not given an opportunity to challenge the evidence of respondent in this respect. It is true that at the close of the case appellant stated that he had no further witnesses to call, but Regulation No. 3 (3) throws the onus upon the Native Commissioner to call such witnesses as he may consider necessary. He has the discretion, but he must exercise the discretion judicially bearing in mind that he cannot administer justice unless he hears both sides. When, therefore, appellant stated (not under oath) that Mangaliso administered the estate the Native Commissioner should have called upon him to name the witnesses who can support his statement and should have called these witnesses.

In order to give appellant an opportunity of rebutting the evidence for respondent in regard to the administration of Jan's estate and adducing further evidence the Native Commissioner's finding will be set aside and the matter will be remitted to him for further evidence. Counsel are agreed that the costs of this appeal be costs in the cause.

During the course of argument Counsel for appellant mentioned that if the parties had been legally represented application would have been made at the close of respondent's evidence to

call rebutting evidence in regard to the administration of the estate. In Herbert Zulu *v* Jacob Tyobeka [1943, N.A.C., (C. & O.), 41] this Court stated that in estate enquiries the Native Commissioner has an absolute discretion to allow parties to be represented. It may be that in the present enquiry it was very desirable that the parties should have been legally represented, but there is nothing on record to indicate that any such application was made to the Native Commissioner.

It is ordered that the appeal be allowed. The finding of the Native Commissioner is set aside and the proceedings are returned to the Native Commissioner for such further evidence as either party may wish to adduce. The costs of this appeal to be costs in the cause.

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: Miss Adv. Egan, Port Elizabeth.

CASE No. 155.

ONE NGXABAZI *v.* **SIGXABAYI SIKEPE and ANO.**

KINGWILLIAMSTOWN: 20th November, 1951. Before J. W. Sleigh, Esq., President, and Messrs. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and pregnancy —Evidence—Corroboration of woman's evidence—False denial of proved opportunity—Judgment—Defendant not entitled to full judgment unless Court is satisfied that his story is true— Appeal Costs—Judgment for defendant altered to absolution— When appellant entitled to costs.

The appeal is against a judgment for defendants (now respondents) in an action in which plaintiff (now appellant) claims payment of five head of cattle or their value £40 as damages for the seduction and pregnancy of his daughter. Second respondent is sued in his capacity as kraalhead.

Held:

(1) That since the girl's evidence is denied on oath her testimony requires corroboration.

Held:

(2) That a false denial by the man of a proved opportunity for sexual intercourse may afford the corroboration which the law requires, but the opportunity for intercourse must be established.

Held:

(3) That the opportunity for sexual intercourse has not been established, and that the other evidence apart from the girl's testimony, is not inconsistent with respondent's innocence.

Held:

(4) That a defendant is not entitled to a full judgment in his favour unless the Court is satisfied that his statement is true, and as the Native Commissioner has not accepted respondent's evidence the judgment for defendant must be altered to one of absolution.

Held:

(5) As to costs of appeal. That appellant has failed to establish his claim both in the trial Court and in this Court, the alteration of the judgment to one of absolution does not amount to a reversal of the trial Court's judgment; and since there was no indication

given to the trial Court of fresh evidence coming to light nor of any application by the appellant for absolution of judgment he cannot avoid the costs of appeal.

Appeal succeeds.

Cases cited:—

Poggenpoel *v.* Morris, N.O., 1938, C.P.D., 90.

Oliver's Transport *v.* Divisional Council, Worcester, 1950 (4) S.A. (C.), 537.

Freedman *v.* Harrismith Town Council, P.H., 1945 (2), F., 63.

Appeal from the Court of the Native Commissioner, Dordrecht.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for defendants (now respondents) in an action in which plaintiff (now appellant) claims payment of five head of cattle of their value £40 as damages for the seduction and pregnancy of his daughter Malastini. Second respondent is sued in his capacity as kraalhead.

Malastini states that first respondent seduced her and caused her pregnancy on New Year's Day, 1951, at a dance on the farm Klipfontein. First respondent admits that he was at the dance but denies that he was intimate with her. The question is whether her evidence is corroborated as is required by law The only witness to support her evidence of this incident is Nodoli. She says that Malastini and first respondent were missing from the hut at the same time. First respondent admits that he left the hut during the night but says that he was sleepy and slept by himself near the hut. The corroborative evidence that Malastini and first respondent were both missing from the hut at the same time is therefore not inconsistent with the latter's innocence.

Malastini, Nodoli and the latter's sister Nolatseana further state that on a subsequent occasion they attended a dance on the farm Driefontein and that on their way home Malastini and first respondent walked together following the others. Malastini goes on to say that they were chased by Mr. Roodt and that she and first respondent ran away together and spent the night below the lands where they were intimate and that she got home at dawn. Nodoli was arrested by Roodt but Nolatseana confirms that Malastini arrived home at daybreak.

First respondent admits that he attended this dance. He stated first that he and Malastini walked home together but immediately thereafter stated that he did not walk with her. He goes on to say that he went home alone hurrying to get back to his work.

The Native Commissioner had no adverse comments to make in regard to the manner in which Malastini and first respondent gave their evidence, but he felt that it would be dangerous to accept the evidence of Nodoli and Nolatseana as sufficiently credible and corroborative of Malastini's testimony, because they are related by marriage to appellant and all lived on the same farm and probably discussed the incidents to which they testify when Malastini's pregnancy was discovered. Now of course the two witnesses are not disinterested but that is not sufficient reason why their evidence should have been rejected. It is improbable that they fabricated their story otherwise their corroborative evidence would have been conclusive. The defence wish to make out that Malastini is the *metsha* of first respondent's brother, Malulu. She denies it and her denial must be accepted because if she wanted to accuse someone falsely she would have accused him since he was also at the first dance. In my opinion first respondent's statement that he did not accompany Malastini when they left the dance is false. Why did he deny it? They were together at the dance and there is no harm in a boy and a girl walking home together.

In Poggenpoel *v.* Morris, N.O. (1938, C.P.D., 90) the *dictum* of Lord Dunedin in Dawson *v.* McKenzie was quoted with approval

as follows: "It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made". Now the proved opportunity to which the girls testify is that first respondent and Malastini were walking home together. They were presumably still in sight when Roodt came on the scene. There was thus no opportunity up to that stage for sexual intercourse. Malastini's evidence stands alone as to what happened thereafter. Nodoli and Nolatseana are unable to say in which direction first respondent and Malastini went or whether they ran away together. It cannot therefore be said that an opportunity for sexual intercourse has been established. The result is that Malastini's evidence of intercourse that night is not corroborated as is required by law.

It is obvious from the Native Commissioner's reasons that he did not accept the evidence of first respondent. Now it is clear from the decision in Oliver's Transport *v.* Divisional Council, Worcester [1950 (4), S.A. (C.), 537] that a defendant is not entitled to a full judgment in his favour unless the Court is satisfied that his story is true. If it appears to the Court that the evidence does not justify a judgment for either party then the judgment should be one of absolution [see Rule 28 (*c*), G.N. No. 2253 of 1928]. The appeal must therefore be allowed and the judgment altered to one of absolution.

Having succeeded on appeal the question is whether in the circumstances appellant is entitled to costs in this Court. In Freedman *v.* Harrismith Town Council [P.H., 1945 (2), F. 63] it was held that where a plaintiff has failed to establish his claim both in the Court below and in the Appeal Court and where a judgment for defendant was altered to one of absolution, there was no reversal of the trial Court's judgment; and when there was no indication given to the trial Court of fresh evidence coming to light, or when no application was made at the time of the judgment for one of absolution, the Court was entitled to assume that the plaintiff did not wish to have another opportunity of bringing a fresh action, and in such circumstances the appellant would not avoid the costs of appeal.

The circumstances set out above are all present in this action. The appeal consequently succeeds and is allowed to the extent of altering the judgment of the Court below to one of absolution from the instance with costs. Appellant to pay the costs of appeal.

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: In default.

CASE No. 156.

MARTIENS QUONGQA *v.* MACDONALD DYAN and ANO.

KINGWILLIAMSTOWN, 20th November, 1951. Before J. W. Sleigh, Esq., President and Messrs. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Assault—Damages for pain and suffering —Quantum—*Depreciation of money—provocation—retaliation must be reasonable—Provocation cannot affect measure of damages for pain and suffering but only amount awarded for* contumelia.

Appellant sued respondents for £50. 17s. 6d. damages for an unprovoked assault, he alleged he suffered numerous injuries, considerable pain, suffering and loss of earnings. The plea is to the effect that appellant was injured in a fight provoked by

himself. But to save litigation respondents paid into Court £5. 17s. 6d. in full settlement of the claim. Appellant did not accept this amount. After hearing evidence the Native Commissioner awarded appellant £4 for loss of earnings, 17s. 6d. medical expenses and £1 for pain and suffering. Appeal was noted solely on the ground that £1 for pain and suffering was grossly inadequate.

Held:

(1) That the award of £1 for pain and suffering is manifestly inadequate.

Held:

(2) That if the parties were Europeans the Native Commissioner would have made a higher award and the fact that appellant was a native should make no difference.

Held:

(3) That the provocation was not such as to justify the severe retaliation resorted to by first respondent.

Held:

(4) That the provocation cannot affect the measure of damages for pain and suffering but only the amount awarded for *contumelia*.

Appeal succeeds.

Cases cited:—

Sandler *v.* Wholesale Coal Suppliers, Ltd., 1941, A.D., 199.

Radebe *v.* Hough, 1949 (1), S.A. (A.D.), 380.

Appeal from the Court of the Native Commissioner, Indwe.

Sleigh (President), delivering the judgment of the Court:—

Appellant sued respondents for the sum of £50. 17s. 6d. as damages for an unprovoked assault as the result of which, he alleged, he suffered a fractured skull, sundry abrasions and bruises on his head, abdomen and legs, considerable pain and suffering and loss of employment and income. He also alleged that he was still suffering headaches and giddiness and that he has incurred 17s. 6d. medical expenses.

The plea is to the effect that appellant was injured in a fight provoked by himself, but in order to save litigation respondents paid into Court by way of compromise the sum of £5. 17s. 6d. in full settlement of appellant's claim.

Appellant did not accept the amount. After hearing evidence the Native Commissioner awarded the appellant the sum of £5. 17s. 6d. being £4 for loss of earnings, 17s. 6d. medical expenses, £1 for pain and suffering and nothing for possible permanent disability, with costs up to the date the sum of £5. 17s. 6d. was paid into Court. The judgment is attacked on appeal solely on the ground that the sum of £1 for pain and suffering is grossly inadequate.

In Sandler *v.* Wholesale Coal Suppliers, Ltd., (1941, A.D., at page 199), Watermeyer, J.A. said: "In considering that question (the amount to be awarded for pain and suffering) it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case. For this reason a Court of Appeal does not readily interfere with the estimate made by the Court appealed from". At page 200 the learned Judge goes on to say that the Court will not interfere "unless there is some striking disparity between its estimate of the damages and that of the trial Court, and

further unless there is some unusual degree of certainty in its mind that the estimate of the trial Court is wrong".

In our opinion the award of £1 for pain and suffering is manifestly inadequate. It is true that Dr. Joubert stated that scalp wounds are normally not very painful, but appellant did not merely suffer an ordinary scalp wound, there was also a simple fracture of the skull. Further he states that he still suffers giddiness on hot days and the Doctor considers that this is possible and that it is likely that this may last for a number of years. Moreover it is notorious that money has depreciated in value whereas pain and suffering are unaffected by economic considerations. We feel sure that if the parties had been Europeans the Native Commissioner would have made a higher award. The fact that appellant is a native should make no difference [see Radebe *v.* Hough, 1949 (1), S.A. (A.D.), 380].

Counsel for respondents contended that as appellant provoked the assault the award of £1 was sufficient. We are not satisfied that appellant did provoke the assault but, assuming that he did, the provocation was not such as to justify the severe retaliation resorted to by first respondent. As a rule a Court will not meticulously weigh the amount of force necessary to repel force, but if the degree of retaliation was not justified, the provocation cannot affect the measure of damages for pain and suffering but only the amount awarded for *contumelia* (see Radebe's case *supra*).

Bearing in mind that the appellant was prone to exaggerate we consider that an amount of £7. 10s. for pain and suffering would be adequate in all the circumstances of the case.

The appeal is allowed with cost and the judgment of the Court below is altered to one for plaintiff for £12. 7s. 6d. and costs.

For Appellant: Mr. B. G. Barnes, Kingwilliamstown.

For Respondent: Mr. Kelly, Lady Frere.

CASE No. 157.

CITANE MQITSANE *v.* BASA PANYA.

KINGWILLIAMSTOWN, 20th November, 1951. Before J. W. Sleigh, Esq., President and Messrs. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Dowry—Refund of after remarriage—Marriage by Native Custom—Dissolution—"Smelling out" not sufficient proof that woman was repudiated by husband's group—There must be proof that she was driven away or that she was forced to leave—Child—belongs to deceased husband even if she had been "smelt out" and driven away.

Plaintiff as heir of W sued defendant (now appellant) for refund of six head of cattle or payment of their value £48 and custody of W's minor child. W married appellant's daughter N and paid seven head of cattle as dowry. He died in 1947 when N was then pregnant. She returned to appellant's kraal where she gave birth. Thereafter three unsuccessful attempts were made to *putuma* her. Appellant had since given her in marriage to another man. Appellant's plea is that N was accused of having caused the death of W by witchcraft, that the relationship which existed between N and her husband's people was terminated thereby and the dowry paid was consequently forfeited. Judgment was entered for plaintiff.

Held:

(1) That the "smelling out" of the wife is not by itself proof that she was repudiated as a wife of her husband's

group. There must in addition be proof that as a result of being "smelt out" she was driven away or forced to leave.

Held:

(2) That there was no such proof.

Held:

(3) That the child belongs to respondent even if she had been "smelt out" or driven away.

Appeal fails.

Cases cited:—

Nyamekwangi *v.* Maduntswana, heard at Umtata on the 15th June, 1951, not yet reported.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for plaintiff (now respondent) as prayed with costs in an action in which he, as heir of the late William Panya, sued defendant (now appellant) for refund of six head of cattle or payment of their value £48, and for the custody of William's minor child.

It is common cause that William married appellant's daughter Nosign, according to Native Custom and paid seven head of cattle as dowry; that they lived at the kraal of William's father, Ernest; that William died in August, 1947 and Nosign, who was then pregnant, returned to appellant's kraal where she gave birth to a female child in February, 1948; that thereafter three unsuccessful attemps were made to *putuma* her; and that appellant has since given her in marriage to another man. On these facts respondent is clearly entitled to refund of the dowry paid for Nosign less the customary deductions, but appellant's case is that Ernest accused Nosign of causing the death of William by witchcraft, that the relationship which existed between Nosign and her husband's people was terminated thereby and that the dowry paid for her has consequently become forfeited. The onus of proving that the relationship had been terminated obviously rests upon appellant.

The Assistant Native Commissioner was not satisfied that the "smelling out" had been established, but even if it is correct that Ernest had called in a witch-doctor to determine the cause of William's illness and death and that the "doctor" had indicated Nosign as responsible for it, that by itself is not proof that she was repudiated as a wife of her husband's group. There must in addition be proof that as a result of being "smelt out" she was driven away, or that her position at her husband's kraal became so intolerable that she was forced to leave. She says that when she asked permission from Ernest to report her "smelling out" to her people he said that she must go and never come back again. This is denied by respondent's witnesses, but even if it were so, it is not evidence that she was repudiated as a wife, nor is there any evidence that she was ill-treated and thus forced to leave. There is the admission that she obtained permission to go to her people's kraal, and the evidence goes to show that she did not take her belongings with her. In the absence of proof that she was given her belongings, that she was accompanied by a man when returned to her father, and that the matter was reported to the headman we must hold that she was not driven away in the legal sense.

She was, of course, entitled to leave the kraal and complain to her dowry holder. Failure thereafter to *putuma* her within a reasonable period may lead to the inference that she had been repudiated. But this would not be a proper inference to draw in the present case, because she was pregnant, presumably with her first child, and in accordance with custom, she would in any

case have gone to her father's kraal for her confinement, and she was *putumaed* shortly after the birth of the child.

In regard to the custody of the child, it would in any case belong to respondent even if she had been "smelt out" and driven away (see Nyamekwangi *v.* Maduntswana, heard at Umtata on 15th June, 1951, and not yet reported).

The appeal is dismissed with costs.

For Appellant: Miss Adv. Egan, Port Elizabeth.

For Respondent: Mr. Kelly, Lady Frere.